

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 JOHN CLERKIN and VERONICA MENDEZ,  
5 individually and on behalf of all  
6 others similarly situated,

7 Plaintiffs,

8 v.

9 MYLIFE.COM, INC. and OAK INVESTMENT  
10 PARTNERS,

11 Defendants.

12 No. C 11-00527 CW

13 ORDER GRANTING  
14 DEFENDANT OAK  
15 INVESTMENT  
16 PARTNERS' MOTION  
17 TO DISMISS AND  
18 DENYING  
19 DEFENDANTS' JOINT  
20 MOTION TO DISMISS  
21 AND MOTION TO  
22 STRIKE  
(Docket Nos. 69,  
23 70 and 73)

24 CYNTHIA MCCRARY, individually and on  
25 behalf of all others similarly  
situated,

26 Plaintiff,

27 v.

28 MYLIFE.COM, INC.,

29 Defendant.

30 CODY BROCK, individually and on  
31 behalf of all others similarly  
32 situated,

33 Plaintiff,

34 v.

35 MYLIFE.COM, INC.,

36 Defendant.

37 In these consolidated cases, Defendants MyLife.com, Inc.; and  
38 Oak Investment Partners have filed three motions: a Rule 12(b)(6)  
39 Motion to Dismiss by Oak Investment Partners; a Rule 12(b)(6)

1 Motion to Dismiss by MyLife.com and Oak Investment Partners;<sup>1</sup> and a  
2 Rule 12(f) Motion to Strike by MyLife.com and Oak Investment  
3 Partners. Plaintiffs John Clerkin, Veronica Mendez, Cynthia  
4 McCrary and Cody Brock oppose the motions. The motions will be  
5 decided on the papers. Having considered the papers submitted by  
6 the parties, the Court GRANTS Oak Investment Partners' motion to  
7 dismiss and DENIES Defendants' joint motion to dismiss and motion  
8 to strike.

9 BACKGROUND

10 Because the parties are familiar with the allegations of this  
11 case, only a limited recitation is provided below.

12 MyLife.com, Inc., operates mylife.com, an Internet website.  
13 MyLife presents those who sign up for its service with "a list of  
14 fake names of people supposedly 'searching for you.'" Consol. Am.  
15 Class Compl. (CACC) ¶ 1. To show that the website-generated lists  
16 are false, Plaintiffs point to a testimonial posted on the Internet  
17 by an individual who registered on the website as "sfsf sdgfsdgs."  
18 Id. at 4:4. The website reported to that individual that seven  
19 people were looking for "sfsf sdgfsdgs." Id. Plaintiffs cite  
20 another individual's Internet testimonial stating that,  
21 irrespective of the zip code entered, the website indicated that  
22 "Grovia Paxton" was residing in that zip code area and was looking  
23 for the individual. Id. at 4:13-18.

24 Clerkin and Mendez received emails from MyLife stating that  
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26 <sup>1</sup> Although the motion's caption states that the motion is  
27 brought by MyLife, the notice of motion indicates that it is  
asserted by MyLife and Oak Investment Partners.

1 people were searching for them. These emails influenced Clerkin's  
2 and Mendez's decisions to subscribe to MyLife's service. When  
3 Clerkin signed up for the service, MyLife represented that he would  
4 be charged \$12.95 for one month; however, he was charged \$155.40.  
5 When Mendez signed up for a trial subscription, MyLife represented  
6 she would be charged \$5.00; however, she was charged \$60.00. At  
7 the time they subscribed, the website represented membership prices  
8 in bold and relatively large print. Walker Decl., Ex. 2.<sup>2</sup> In grey  
9 and small print, below the prices, the website stated, "One payment  
10 for full membership term." Id., Ex. 2. On a separate "payment  
11 page," the website indicated the amounts for the single payment to  
12 be charged for each membership term and that "[a]ll charges are  
13 non-refundable." Id.; Defs.' Jt. Mot. to Dismiss 18:1. After  
14 using the service, Clerkin and Mendez discovered that no one they  
15 knew was looking for them.

16 McCrary and Brock saw advertisements "stating that someone  
17 could be looking for [them] on MyLife.com." CACC ¶¶ 9-10. The  
18 advertisement McCrary saw indicated she could find out by  
19 subscribing to the service, while the advertisement Brock saw said  
20 "he could find out whom for free." Id. ¶ 10. Both McCrary and  
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22 <sup>2</sup> Under the "incorporation by reference" doctrine, courts may  
23 "take into account documents 'whose contents are alleged in a  
24 complaint and whose authenticity no party questions, but which are  
25 not physically attached to the [plaintiff's] pleading.'" Knivele v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (quoting In re Silicon Graphics Secs. Litiq., 183 F.3d 970, 986 (9th Cir. 1999)). This  
doctrine extends "to internet pages as it does to printed  
material." Knivele, 393 F.3d at 1076. Plaintiffs do not dispute  
that the contents of the MyLife website are at issue in their  
complaint. Nor do they challenge the authenticity of Exhibit 2 of  
the Walker Declaration.

1 Brock discovered that "no one was looking for [them]." Id. ¶¶ 9-  
2 10.

3 Oak Investment Partners, a venture capital firm, provided \$25  
4 million to MyLife. It "conspired with MyLife and others." CACC  
5 ¶ 12.

6 Plaintiffs bring the following claims against Defendants:  
7 (1) common count for money had and received; (2) violation of  
8 California's Consumer Legal Remedies Act (CLRA), Cal. Civ. Code  
9 §§ 1750, et seq.; (3) violation of the fraud prong of California's  
10 Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200, et  
11 seq.; (4) violation of the UCL's unlawful prong; (5) violation of  
12 the UCL's unfairness prong; and (6) unjust enrichment and common  
13 law restitution.

14 Plaintiffs' CACC is based largely on Clerkin and Mendez's  
15 amended complaint, which the Court dismissed in part. Among other  
16 things, Clerkin and Mendez's claims against Oak Investment Partners  
17 were dismissed because their allegations did not support liability  
18 against it.

## LEGAL STANDARD

20 A complaint must contain a "short and plain statement of the  
21 claim showing that the pleader is entitled to relief." Fed. R.  
22 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a  
23 claim is appropriate only when the complaint does not give the  
24 defendant fair notice of a legally cognizable claim and the grounds  
25 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
26 (2007). In considering whether the complaint is sufficient to  
27 state a claim, the court will take all material allegations as true

1 and construe them in the light most favorable to the plaintiff. NL  
2 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
3 However, this principle is inapplicable to legal conclusions;  
4 "threadbare recitals of the elements of a cause of action,  
5 supported by mere conclusory statements," are not taken as true.  
6 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly,  
7 550 U.S. at 555).

8 DISCUSSION

9 I. Oak Investment Partners' Motion to Dismiss

10 Oak Investment Partners asserts that Plaintiffs have not plead  
11 facts supporting liability against it for MyLife's alleged  
12 misconduct. Plaintiffs respond that their allegation that Oak  
13 Investment Partners provided funds to and conspired with MyLife is  
14 sufficient to state their claims against it.

15 Plaintiffs identify no allegation that distinguishes the CACC  
16 from Clerkin and Mendez's previously-dismissed complaint.

17 Plaintiffs allege only that Oak Investment Partners provided \$25  
18 million to MyLife. Even if true, this is not sufficient to support  
19 conspiratorial or aider-and-abettor liability against Oak  
20 Investment Partners. This allegation does not suggest that Oak  
21 Investment Partners shared a common plan with MyLife, which is  
22 necessary to support liability as a co-conspirator. Applied Equip.  
23 Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11 (1994).

24 Nor does it imply Oak Investment Partners was aware of MyLife's  
25 alleged fraudulent scheme or that it breached a duty to Plaintiffs,  
26 as required to impose aider-and-abettor liability. Saunders v.  
27 Superior Court, 27 Cal. App. 4th 832, 846 (1994).

1 Accordingly, Plaintiffs' claims against Oak Investment  
2 Partners are dismissed. Based on the dismissal of Clerkin and  
3 Mendez's amended complaint, Plaintiffs were on notice as to what  
4 was required to state a claim against Oak Investment Partners.  
5 Thus, this dismissal is without leave to amend.

6 | II. Defendants' Joint Motion to Dismiss

7 A. Class Allegations

8 Defendants argue that certifying this case as a class action  
9 is not appropriate and, pursuant to Rule 12(b)(6), challenge  
10 Plaintiffs' class allegations.

11 Defendants fail to identify any authority permitting the use  
12 of a motion to dismiss for failure to state a claim to contest the  
13 suitability of class certification. They cite Whittlestone, Inc.  
14 v. Handi-Craft Co., 618 F.3d 970 (9th Cir. 2010), which does not  
15 support their position. There, the Ninth Circuit held that Rule  
16 12(f) did not authorize a district court to strike a punitive  
17 damages claim on the basis that it was barred as a matter of law.  
18 Id. at 974-75. The claim exhibited none of the characteristics  
19 enumerated in Rule 12(f),<sup>3</sup> and the court opined that the  
20 defendant's motion "was really an attempt to have certain portions  
21 of Whittlestone's complaint dismissed or to obtain summary judgment  
22 against Whittlestone as to those portions of the suit -- actions  
23 better suited for a Rule 12(b)(6) motion or a Rule 56 motion, not a  
24 Rule 12(f) motion." Id. at 974. The court reasoned that

26       <sup>3</sup> Rule 12(f) provides that a court "may strike from a pleading  
27 an insufficient defense or any redundant, immaterial, impertinent,  
or scandalous matter."

1 permitting the use of Rule 12(f) to eliminate claims would create  
2 "redundancies within the Federal Rules of Civil Procedure, because  
3 a Rule 12(b)(6) motion (or a motion for summary judgment at a later  
4 stage in the proceedings) already serves such a purpose." Id. The  
5 different standards of review applied to decisions under Rule  
6 12(b)(6), which are reviewed de novo, and Rule 12(f) motions, which  
7 are reviewed for an abuse of discretion, also supported the court's  
8 conclusion. Id.

9 Indeed, Whittlestone counsels against employing Rule 12(b)(6)  
10 to challenge an action's fitness for class treatment. First, Rule  
11 12(b)(6) permits a party to assert a defense that the opposing  
12 party has failed "to state a claim upon which relief can be  
13 granted." A class action is a procedural device, not a claim for  
14 relief. See Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326,  
15 331 (1980). Second, other Federal Rules of Civil Procedure exist  
16 to address impertinent allegations and class certification.<sup>4</sup> Thus,  
17 the use of Rule 12(b)(6) to address the same would create  
18 redundancies in the Federal Rules. Finally, the standard of review  
19 applied to orders granting motions to dismiss differs from that

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20 <sup>4</sup> Some defendants have brought motions under Rule 12(f) to  
21 strike class allegations from complaints. See, e.g., Cholakyan v.  
22 Mercedes-Benz USA, LLC, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 2682975, at  
\*21 (C.D. Cal.). While courts entertain such motions, it is rare  
23 that class allegations are stricken at the pleading stage. Id.  
(listing cases). Another alternative is a motion pursuant to Rule  
24. See, e.g., Vinole v. Countrywide Home Loans, Inc., 571 F.3d  
935, 939-941 (9th Cir. 2009); Kamm v. California, 509 F.2d 205, 206  
n.2 (9th Cir. 1975).

25 Even if Defendants had brought a Rule 12(f) or Rule 23 motion,  
26 it would fail. They have not shown that Plaintiffs' allegations  
27 are "redundant, immaterial, impertinent, or scandalous." Fed. R.  
Civ. P 12(f). Nor have they shown, at this early stage in the  
litigation, that class treatment is improper as a matter of law.

1 governing orders granting or denying class certification. The  
2 Ninth Circuit reviews de novo orders dismissing claims pursuant to  
3 Rule 12(b)(6). Whittlestone, 618 F.3d at 974. Grants and denials  
4 of class certification, however, are reviewed for abuse of  
5 discretion. Marlo v. United Parcel Serv., 639 F.3d 942, 946 (9th  
6 Cir. 2011).

7 Rule 12(b)(6) is not the appropriate procedural vehicle to  
8 challenge class allegations. Accordingly, Defendants' Rule  
9 12(b)(6) motion concerning Plaintiffs' class allegations is denied.  
10 The Court has scheduled a date to hear Plaintiffs' motion for class  
11 certification. Defendant MyLife should present its arguments  
12 against class certification in its opposition to that motion.

13       B. CLRA Claims

14 Defendants argue that McCrary's and Brock's CLRA claims fail  
15 because they do not allege "that they received any solicitation  
16 from MyLife." Defs.' Mot. to Dismiss at 15:3. Defendants'  
17 argument appears to be that, because McCrary and Brock allegedly  
18 saw an advertisement and did not receive an email, it is  
19 irreconcilably inconsistent with other allegations in the  
20 complaint. Defendants point to a general allegation that MyLife  
21 violated the CLRA by "disseminating false solicitations representing  
22 that 'someone' is looking for the recipient." CACC ¶ 33. However,  
23 Plaintiffs did not allege that this was the sole manner in which  
24 MyLife violated the CLRA. Thus, McCrary's and Brock's specific  
25 allegations and this general allegation are not inconsistent, and  
26 their CLRA claims need not be dismissed.

27 Defendants also argue that Clerkin's and Mendez's CLRA claims

1 based on MyLife's billing practices must be dismissed because a  
2 reasonable consumer would not have found MyLife's representations  
3 on its website deceptive. Plaintiffs respond that consumers could  
4 be misled by the placement and display of the effective rates of  
5 the memberships in relation to the amounts MyLife actually charges  
6 in advance.

7 While the monthly rates are displayed in bold and relatively  
8 large print, it is not evident that a subscriber will be charged  
9 immediately for the full amount for an entire membership term. As  
10 noted above, the website states, "One payment for full membership  
11 term." This language can be viewed as ambiguous and susceptible of  
12 multiple meanings. A consumer could understand this language to  
13 mean that payments will not change over a membership term; in other  
14 words, a twelve-month membership will be charged invariably at  
15 \$14.95 every month. Defendants point to language stating, "One  
16 payment of \$179.40 for a 12 month plan," which they argue suggests  
17 that customers will be charged a single amount. However, this  
18 language is presented in grey and small print on a "payment page,"  
19 which is apparently separate from the "subscription page," on which  
20 membership terms and prices are displayed. Defs.' Jt. Mot. to  
21 Dismiss at 17:28-18:2.

22 Based on the present record, the Court declines to hold, as a  
23 matter of law, that MyLife's presentation of its subscription  
24 prices is not deceptive. "California courts . . . have recognized  
25 that whether a business practice is deceptive will usually be a  
26 question of fact not appropriate for decision on demurrer."

27 Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)

1 (citing Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal.  
2 App. 4th 115, 134-35 (2007)). Defendants' arguments do not warrant  
3 a departure from this general rule.

4 In sum, Defendants' motion to dismiss Plaintiffs' CLRA claims  
5 is denied.

6 C. UCL Claims

7 Defendants argue that Plaintiffs' UCL claims must be dismissed  
8 because they have not alleged unlawful, unfair or fraudulent  
9 conduct. However, Plaintiffs have stated claims under the CLRA,  
10 which Defendants acknowledge can support Plaintiffs' claims under  
11 all three prongs of the UCL.

12 Accordingly, Defendants' motion to dismiss Plaintiffs' UCL  
13 claims is denied.

14 D. Common Count for Money Had and Received and Claims for  
15 Unjust Enrichment and Common Law Restitution

16 Defendants assert that Plaintiffs' common count and claims for  
17 unjust enrichment and common law restitution must be dismissed  
18 because Plaintiffs fail to state UCL and CLRA claims. However, as  
19 already explained, Plaintiffs' UCL and CLRA claims are stated  
20 sufficiently.

21 Accordingly, Defendants' motion to dismiss Plaintiffs' common  
22 count and claims for unjust enrichment and common law restitution  
23 is denied.

24 III. Defendants' Motion to Strike

25 Defendants move to strike paragraph four of the CACC, which  
26 lists alleged complaints by non-parties about MyLife's website.  
27 They contend that these complaints are immaterial and impertinent.

1 Matter is immaterial if it has no essential or important  
2 relationship to a claim for relief or defense. Whittlestone, 618  
3 F.3d at 974. Impertinent matter is that which does not pertain to  
4 issues in question. Id.

5 It is true that these third party complaints cannot be  
6 submitted to a jury for the truth of the matters they assert. See  
7 Fed. R. Evid. 802. However, the complaints are neither immaterial  
8 nor impertinent. They are not immaterial because they relate to  
9 Plaintiffs' claims that MyLife misled consumers. They are  
10 pertinent to whether MyLife engaged in misconduct because they  
11 place Plaintiffs' individual circumstances in context.

12 Accordingly, paragraph four of the CACC will not be stricken.

13 CONCLUSION

14 For the foregoing reasons, the Court GRANTS Oak Investment  
15 Partners' motion to dismiss (Docket No. 69) and DENIES Defendants'  
16 joint motion to dismiss and motion to strike (Docket Nos. 70 and  
17 73). Plaintiffs' claims against Oak Investment Partners are  
18 dismissed without leave to amend. MyLife shall answer Plaintiffs'  
19 complaint within fourteen days of the date of this Order. Fed. R.  
20 Civ. P. 12(a)(4)(A).

21 Plaintiffs' motion for class certification is due January 12,  
22 2012. MyLife's opposition to Plaintiffs' class certification  
23 motion and its cross-motion for summary judgment, contained in a  
24 single brief, are due March 15, 2012. Plaintiffs' reply in support  
25 of class certification and their opposition to MyLife's summary  
26 judgment motion, contained in a single brief, are due May 17, 2012.  
27 MyLife's reply in support of its motion for summary judgment is due  
28

1 May 24, 2012. The hearing on Plaintiffs' motion for class  
2 certification and MyLife's motion for summary judgment is scheduled  
3 for June 14, 2012 at 2:00 p.m.

4 IT IS SO ORDERED.

5  
6 Dated: 8/29/2011



7 CLAUDIA WILKEN  
8 United States District Judge